

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 3050-1112 KE

Child's Name: H.G.

Date of Birth: [redacted]

Dates of Hearing: 7/6/12, 7/24/12, 8/14/12, 9/6/12,
10/11/12, 10/18/12, 11/7/12, 11/14/12, 12/13/12, 1/3/13

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent

Parent Attorney

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Date Record Closed:

January 28, 2013

Date of Decision:

February 18, 2013

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, enrolled in a District middle school, is IDEA eligible due to a genetic condition that is commonly considered to cause intellectual disability, as well as language and social skill deficits that resemble characteristics of autism. The family moved into the District early in Student's 3rd grade school year. From that time to the present, at Parent's insistence, Student's placement for most of the school day has been, and continues to be, primarily in grade-level regular education classes, working on grade level curriculum.

During the 2010/2011 school year, Parent refused consent for the triennial reevaluation, which was the District's first opportunity to conduct its own evaluation of Student. After prevailing on its consent to override due process complaint, the District completed a reevaluation in December 2011, but Parent disagreed with the results and requested an IEE by [an out of state] specialist in psycho-educational evaluations of children with Student's medical diagnosis. Upon refusing that request, the District filed the due process complaint in this case to support the appropriateness of its evaluation and to obtain an order that its proposed IEP based upon the evaluation is appropriate and may be implemented.

Due to the sequential unavailability of essential participants during the summer of 2012, and the need for evening hearing sessions beginning in September 2012 to accommodate Parent's employment and child care constraints, the hearing had an unusually high number of sessions over an unusually long period. The evidence, however, left no doubt that the District conducted an appropriate evaluation and proposed an appropriate change of placement. Accordingly, the District will not be required to provide an IEE and may immediately implement its proposed IEP, including the change of placement. Since the IEP proposal is now over a year old, however, an IEP meeting is needed to review the goals and specially designed instruction in

light of Student's present levels to assure that the IEP appropriately addresses Student's current needs.

ISSUES

1. Was the evaluation conducted by the School District in 2011 procedurally and substantively appropriate?
2. Did the District's reevaluation appropriately and accurately assess all of Student's needs?
3. Is the District's current IEP proposal appropriate for Student?
4. If the reevaluation is not appropriate and if an Independent Educational Evaluation (IEE) is warranted, in what areas is a new or different evaluation necessary in order to have a complete and appropriate evaluation of Student?
5. If the proposed IEP is found not to be appropriate, what level and type of services are necessary at this time for Student to receive an appropriate program and placement?

FINDINGS OF FACT

1. Student, born [redacted] is a [preteenaged] resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 13, 14)
2. Prior to the District's recent reevaluation, Student's IDEA eligibility was based upon the disability categories of Other Health Impairment (OHI) and Speech/Language Impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 14)
3. Student has been diagnosed with attention-deficit/hyperactivity disorder (ADHD), which is treated with medication to mitigate the behavioral/attention symptoms. (P-11, p. 2; S-11 p. 1)
4. At the age of 15 months, Student was medically diagnosed with a genetic disorder that underlies most of Student's academic and other school-related difficulties. (N.T. p. 1537; P-11, pp. 1, 14; S-11 p. 1)
5. Characteristics of the genetic disorder that Student exhibits include: a) visual defensiveness/difficulty processing a lot of material on a page; b.) physical manifestations of excitement [redacted]; c) verbal perseveration; d) difficulties with visual motor planning; e) sensory regulation issues. (N.T. pp. 1538—1541; P-11 pp. 14, 15)
6. Anxiety is another common characteristic of the genetic disorder, and Student manifests a high degree of anxiety in school. The anxiety is aroused in many situations, such as

when Student is exposed to a loud, sudden noise; when another person comes into close physical proximity, *i.e.*, encroaches on “personal space; when Student is the focus of attention, *i.e.*, is in the “spotlight;” and when confronted with academic demands, including testing situations and generally in the classroom. (N.T. pp. 329, 330, 1538, 1540, 1544; P-11 pp. 8, 9, 12, 14, 15, 16)

7. The constellation of symptoms arising from the genetic disorder, particularly the anxiety, is frequently termed “hyperarousal.” (N.T. pp. 330, 1540)
8. A due process hearing decision issued in July 2011 overrode Parent’s refusal to consent to a triennial reevaluation and permitted the District to conduct cognitive and achievement testing, as well as assessments of Student’s adaptive functioning as the District proposed. (ODR #1453/10-11 JS, July 13, 2011)
9. Prior to beginning the District’s evaluation of Student, the school psychologist researched Student’s genetic condition, explaining that when evaluating a child with a medical diagnosis, she tries to find out as much as possible about that student’s condition, how it may affect the evaluation process and possibly inform the selection of assessments. (N.T. pp. 326, 327)
10. The school psychologist also gathered information about assessing Student from the writings of a school psychologist from [another state] recognized by Parent as an expert in Student’s condition and that Parent requested conduct an IEE of Student at public expense. Although that psychologist has compiled considerable data concerning how the behavioral traits of the genetic disorder impact test performance, the available information disclosed no “formula” for selecting appropriate assessments for evaluating a child with Student’s condition. (N.T. pp. 327, 328)
11. In conducting the evaluation, the District school psychologist also consulted and followed recommendations of other researchers knowledgeable about Student’s genetic condition. The school psychologist conducted nine testing sessions, each averaging an hour or less, including breaks, over a period two months and administered a variety of assessments designed to identify cognitive potential, academic achievement, behavioral and adaptive functioning. (N.T. pp. 324—326, 399—402, 630, 633, 634)
12. The school psychologist reported her observations of Student during the testing sessions, noting that Student willingly went with her and appeared to be motivated to work at the tasks presented during the testing, but could work for only 10—15 minutes at a time before needing a break. (S-11 pp. 9, 10)
13. Student exhibited variable attention and focus during the testing sessions, often requiring prompting and encouragement to continue with the tasks required by the assessments. When presented with tasks perceived to be too difficult, Student exhibited anxiety and frustration, and would ultimately refuse to continue when Student believed that items could not be successfully completed. In accordance with the requirements for maintaining standardized conditions to assure reliability and validity of the test scores,

the examiner discontinued subtests when Student either reached the designated number of incorrect responses or refused to respond to additional items. (S-11 p.10)

14. The District school psychologist administered three measures of cognitive ability, including two measures that are not heavily dependent on verbal skills in order to elicit abilities that might be masked by language difficulties: WISC-IV Integrated (Wechsler Intelligence Scale for Children-Fourth Edition); Kaufman Brief Intelligence Test-Second Edition (KABC-II); Comprehensive Test of Non-Verbal Intelligence- Second Edition (CTONI-2). (S-11 pp. 10—15)
15. Student's performance was consistent across all three assessments, with all subtests yielding scores ranging from below the .1 percentile to below the 1st percentile (very low or extremely low). The school psychologist noted that although Student's verbal comprehension skills were significantly below average, performance improved when test items were not exclusively verbal, but included visual references. (S-11 pp. 10—15, 17)
16. In order to assesses Student's visual-motor and perceptual skills, including social perception (the ability to understand that others have different points of view) and affect recognition (the ability to recognize and identify emotions from facial expressions), the school psychologist also administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI, Fifth Edition), the Bender Gestalt II and two subtests of the Developmental Neuropsychological Assessment, 2nd Edition (NEPSY-II). The assessment results ranged from below the 2nd percentile for the social perception subtest to the .7 percentile on the Beery VMI. (N.T. pp. 680, 681; S-11 pp. 15, 16)
17. The visual-motor, perceptual and social perception/recognition measures revealed that Student has significant difficulties with visual-motor-perceptual processing, motor planning, fine motor skills and with understanding the feelings, perceptions and intentions of others. (S-11 p. 16)
18. To assess Student's academic achievement, the school psychologist administered a standardized achievement assessment, the WIAT-III (Wechsler Individual Achievement Test-Third Edition). A District reading specialist administered the Critical Reading Inventory (CRI), the Yopp-Singer Test of Phonological Awareness and an observation survey covering both the ability to follow and notice changes in printed text and a spelling assessment. A District math specialist conducted two one hour assessments using curriculum-based materials at the end of year 1st and 2nd grade levels. (N.T. pp. 260, 261, 402, 403, 689; S-11 pp. 17—21)
19. Consistent with the cognitive testing, all of Student's scores on the WIAT-III were below the .1 percentile, indicating that all academic skills are still emerging at a very basic level and that Student has a limited ability to apply skills that have been acquired. Based on the standardized test results, the school psychologist concluded that Student has a significant need for direct, systematic instruction at a modified pace. (S-11 p. 17)

20. The reading specialist noted that Student lacked basic decoding, sight word and comprehension strategies, and frustrated at the pre-primer level on the CRI. She recommended that reading instruction emphasize comprehension strategies. (S-11 pp. 19, 20)
21. Since Student responded correctly to only 8 of 25 items on the 1st grade assessment and three of 23 items on the second grade assessment and appeared to guess at three of the items on the 1st grade assessment, the math specialist concluded that Student needs to continue instruction on 1st and 2nd grade math standards, with a spiraling curriculum, manipulatives used whenever possible, and an emphasis on math vocabulary and problem-solving. (S-11 p. 20)
22. Student's speech/language therapist conducted the speech/language portion of the reevaluation, consisting of the CELF-4 (Clinical Evaluation of Language Fundamentals-Fourth Edition) and PPVT-IV (Peabody Picture Vocabulary Test, Fourth Edition) as formal assessments as well as an informal language assessment based on her therapy sessions with Student and classroom observations. (S-11 pp. 21—25)
23. Student's language skills as measured by the CELF-4 were in the very low range of functioning, with all index scores at or below the .1 percentile. Student's highest score on any of the standardized assessments included in the reevaluation, at the 4th percentile, was achieved on the PPVT-IV, a measure of receptive vocabulary. Although that is an area of relative strength, Student's performance was still well below average. Student also had great difficulty applying vocabulary skills in meaningful ways. Due to the severity of Student's language deficits, the speech/language pathologist recommended that the language goals should be embedded in the curriculum and supported throughout the school day. (N.T. pp. 950—961, S-11 pp. 22—25)
24. The reevaluation also included physical therapy (PT) and occupational therapy assessments (OT). The PT assessment relied to an extent on assessments/observations conducted in 2010 and 2011, updated with standardized muscle testing, assessments of range of motion, completion of a motor checklist by the PE teacher and classroom observations. Despite some mild motor impairments, Student's ability to maintain appropriate posture for academic tasks, fully participate in recess and gym and move about safely and independently in the school environment indicated no current need for direct PT services. (S-11 pp. 44—45)
25. Student exhibits far greater needs in the areas of fine motor skills, including handwriting, and sensory integration, with a continuing need for the direct OT services Student has been receiving. (S-11 pp. 38—44)
26. In addition to classroom observations by the school psychologist, teachers and related services providers, Student's behavioral, social, emotional and adaptive functioning was assessed by means of standardized rating scales, specifically the BASC-2 (Behavior Assessment System for Children-Second Edition), the BRIEF (Behavior Inventory of Executive Functions), the Vineland-II Adaptive Behavior Scales, a Student

Interview/Self Report and by behavior observations in various school settings by a District behavioral specialist. (S-11 pp. 3—7, 28—32)

27. Teacher ratings on the Vineland, obtained by the school psychologist completing the checklist based upon interviewing Student's math and social studies teacher, with additional input from Student's language arts teacher and aide. The standard scores obtained placed Student's functioning in school in the low range, less than the 1st percentile across all domains: communication, daily living skills and socialization, placing Student in the moderately intellectually disabled range. (S-11 pp. 30, 31)
28. Two of Student's teachers (math and social studies, science) completed the BASC-2 rating scale and two (math and social studies, language arts) completed the BRIEF. On the BASC-2, both teachers' ratings were in the clinically significant range for several adaptive and other skills. The teachers also reported an unusually high number of disruptive classroom behaviors that adversely affected Student's school functioning. The observations were consistent with significant problems disclosed by the BRIEF rating scales. (S-11 pp. 28—30)
29. The school psychologist also sent the BASC-2 and Vineland-II rating scales to Parent, who returned them after the RR was completed. The RR was updated in January 2012 with an Addendum to include the results of Parent's rating scales, all of which placed Student in the average range of functioning at home and in community settings. (S-26)
30. Parent identified three people who provided instruction to Student in community activity settings and knew Student well, but did not include Student's religious education teacher where Student and Parent regularly attend services [redacted]. The school psychologist sent a Teacher/Specialist Narrative Form to the persons identified by Parent, asking them to describe Student's work habits, attention/concentration, needs, strengths, behavior and skills in the areas of communication, organization, and social/peer relationships. No one returned the forms, despite follow-up telephone calls from the school psychologist. (N.T. pp. 101—104, 291—292; S-14, S-16, S-17, S-18)
31. At Parent's request, the school psychologist also sent the BASC-2 and BRIEF rating scales, along with the Teacher/Specialist Narrative Form, to a friend of Parent who has been providing reading and math instruction to Student since June 2010, but she did not return any of the forms. (N.T. pp. 254—257, 446, 1450, 1498—1502; S-15, S-32)
32. Based upon the significant deficits in all areas of cognitive, academic and adaptive functioning that the assessment results identified, the school psychologist concluded that Student meets the criteria in the Pennsylvania and federal special education regulations for identification in the ID disability category, functioning in the moderate range of mental retardation. (N.T. pp. ; S-11 pp. 27, 28)
33. Parent subsequently procured a private evaluation from a school psychologist/college professor, who assessed Student in her office, with Parent present, over approximately a 2.5 hour period and observed Student at school for approximately five hours. (P-11)

34. Although Parent's evaluator estimated during testimony that the assessments occupied approximately 2 hours and 15 minutes of that time, her report stated that before beginning the testing, there was a period of getting comfortable with the examiner and the setting, and that Student showed her pictures on [an] I-pad during that time; that Student was given a 15 minute break during the administration of the first test, when Student became anxious; that Student was given a second 15 minute break between the second and third assessments. (N.T. pp. ; P-11 pp. 8, 9)
35. The independent evaluator administered the PPVT-IV, the TONI-4 (Test of Nonverbal Intelligence, 4th Edition) and three of 11 sub-tests of the Diagnostic Achievement Battery-3 (DAB-3), an achievement test that she helped to develop and standardize. (N.T. pp. 2075, 2076; P-11 pp. 9, 11, 12)
36. Throughout the testing session, the examiner noted Student's increasing anxiety as the test items became more difficult. The evaluator also noted the need for encouragement and re-direction. (P-11 pp. 8, 9)
37. Based upon the results of the TONI-4, the evaluator concluded that Student is functioning in the low average range of cognitive ability. In describing the test results, the evaluator took note of Student's ability to focus on the tasks for a period of 30 minutes and engage in cognitive problem-solving. In her observation of test-taking behaviors, the evaluator noted that Student began to breathe heavily and began to problem-solve aloud after 10 minutes of working on the TONI-4 and began to state that s/he could not complete the tasks. Student was able to self-redirect for another 15 minutes before reaching the ceiling. Although the examiner was able to elicit several more correct responses with instructions to relax and take additional time, those items could not be scored because of the deviation from standardization procedures. (P-11 pp. 8, 9)
38. The independent evaluator's results on the PPVT-IV and the achievement tests were also considerably higher than the District results. (P-11 pp. 8, 9, S-11)
39. The evaluator concluded that Student has an aversion to academic tasks and exhibits debilitating anxiety in the school setting. The evaluator further concluded that Student needs a smaller, more supportive classroom environment than the regular education middle school classes in which she observed Student, and that the curriculum should be based on Student's instructional levels. Although she agreed that instruction in an appropriate special education class for children with learning disabilities for part of the school day for direct instruction, she believes that Student would perform better both academically and socially, in a private school for students with disabilities. (N.T. pp. 1886—1888, 1924, 1925, 2031, 2031, 2035, 2036, 2058, 2064, 2 ; P-11 pp. 8, 9, 15, 16)
40. The tutor Parent hired also described Student's current functioning in reading and math at a higher level than the District's evaluation results indicated. Although she conducts no assessments, she believes Student is comprehending texts that they read together at a 3rd grade level and that Student's decoding skills are at a 2nd grade level. (N.T. p. 1492)

41. The tutor described Student's ability to engage in academic tasks successfully with individualized, one to one instruction and the use of manipulatives to build words in reading. (N.T. pp. 1449—1483, 1504)
42. The last IEP with which Parent agreed and remains in place was dated October 5, 2009, the beginning of Student's 4th grade year. The IEP provided for Student to be instructed entirely in the grade level curriculum and to spend 81% of the day in the regular education classroom. Modifications and supplemental aides and services were described in 37 items of specially designed instruction, which included, among many other provisions, alternate assessments with questions presented in a particular manner, choice of order for completing academic tasks, study guides for tests at least 4 days in advance of the test, require only as many questions as needed to demonstrate mastery, presentation of a starter sound to engage memory, not requiring Student to answer certain types of questions, limiting the number of items presented on a page. (S-1 pp.20, 21, 30—34)
43. The IEP proposed by the District after the reevaluation was completed includes three reading goals, for decoding, identifying concepts of print and deriving meaning from text (comprehension) and for identifying narrative elements. The IEP also includes an additional language arts goal for writing sentences using weekly spelling words. (S-33 pp. 22—25)
44. The math goals include demonstrating a basic understanding of the relationship between numbers and quantities and telling time on analog and digital clocks to the hour and half hour. (S-33 pp. 26, 27)
45. The proposed IEP also includes behavior goals for self-advocacy and remaining on task in the classroom with a reduced level of re-direction prompts, as well as a positive behavior support plan, speech/language and OT goals. (S-33 pp. 28—34, 46—50)
46. The District proposes changing the level of Student's learning support services from itinerant to supplemental and providing replacement reading/language arts and math instruction in a special education setting, with inclusion in grade level science and social studies classes. The proposed IEP reduces Student's time in the regular education setting from 81% of the school day to 56% of the school day, a reduction of 25%. (S-1 pp. 39, 40, S-33 pp. 40, 41)

DISCUSSION AND CONCLUSIONS OF LAW

Although the triggering event for the District's due process complaint was Parent's request for an IEE, the dispute between the parties also centers on the District's proposed IEP, as well as the District's conclusion that Student's cognitive potential is in the intellectual

disability (ID) range based on standardized assessments of cognitive ability and assessments of adaptive skills.¹ Both of the District's conclusions were anticipated by Parent and were, in fact, an important reason for Parent's refusal to consent to the evaluation. *See* Due Process Hearing Decision No. 1453/10-11 JS at 8 (7/13/11, Culleton). Underlying the evaluation issues in both the previous case and this case was Parent's strong belief, and often expressed contention, that from the outset, the evaluation was intended and designed to support the District's predetermination that Student cannot be appropriately and successfully educated in the regular education classroom using grade level curriculum materials. *Id.*; *See also* N.T. pp.30 (Parent's Opening statement), 1485, 1486 (Characterizing the District's proposal for direct reading instruction as "code for a special education class.")

Parent expended considerable time during the hearing attempting to establish that the District's evaluation procedures were flawed and led to the inaccurate conclusion that Student is intellectually disabled whereas, according to Parent, Student has a significant expressive language disability that interferes with Student's performance in the regular education classroom without a high level of supplemental aides and services. Parent contends that the IDEA's least restrictive environment (LRE) provisions require the District to provide whatever level of supports and services necessary to permit Student to make meaningful progress in grade level, regular education classes.

In promoting those arguments in support of rejecting the District's evaluation and proposed IEP, however, Parent ignores the reality, established by her own witnesses, that at the

¹ The disability category designation "mentally retarded" (MR) was still in use at the time the reevaluation report was issued, as reflected in part in the District's reevaluation report (RR) and other documents. The MR designation was replaced by the term "Intellectual Disability" (ID) in January 2012.

The IDEA regulations, however, still define the criteria for that category under the designation "mental retardation," described as "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." 34 C.F.R. §300.8(c)(6).

time the evaluation was completed, Student was far below a 6th grade level in basic reading, writing and math skills and that Student remains well below a 7th grade level in those skills. Moreover, although Parent's expert witness expressed the opinion that the District's reevaluation was inappropriate, she also noted that an expressive language disability is "a cognitive issue" based on brain physiology. (N.T. p. 1879) Nevertheless, whether Student's very impaired academic performance is described as arising from an intellectual disability or should be described in terms of the combined effects of significant language and motor impairments, as Parent suggests, is not as important as determining how to appropriately address Student's academic and other needs in the public school setting. Although it is true that the effects of Student's disabilities, which create complex needs for academic and behavioral support in the classroom, provide no basis for completely removing Student from the regular education setting, that is not what the District is proposing. The record established, however, that due to the effects of Student's disabilities on academic functioning, and particularly the high anxiety that is characteristic of Student's genetic condition, Student cannot be satisfactorily educated entirely in the regular education middle school classroom setting and entirely with grade level curriculum materials. The school psychologist who testified at the due process hearing on behalf of Parent and performed a very limited private evaluation of Student, observed Student in the school setting and testified on behalf of Parent at the due process hearing concluded that Student cannot be successfully educated in a public school regular education setting due to the high anxiety she observed. Moreover, the testimony of the tutor Parent hired to instruct Student in basic reading, writing and math skills strongly suggests that Student benefits from direct, intensive instruction in basic academic skills.

It is certainly understandable that a caring parent will do everything possible to maximize her child's potential in all areas. Parent is clearly devoted to Student, recognizes Student's strengths in many areas of personal and family life, and demonstrates her support by actively seeking opportunities for Student to participate in community and personal activities, such as religious services and instruction along with same age, typically developing peers. In the school setting, however, the limitations created by Student's disabilities require more intensive academic support than can reasonably be provided in a regular education middle school classroom, where peers have acquired academic skills needed to access grade level curriculum to a greater extent than Student. Student needs basic reading, writing and math skills taught at a lower level than can effectively be provided in a regular education middle school classroom. Focusing on developing reading and writing skills, in particular, are necessary to enable Student to participate in grade level classes in content areas such as social studies and science, which the District's IEP proposal contemplates. (FF 46)

Legal Standards Applicable to the Issues in this Case

1. Right to a Due Process Hearing/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

In *Schaffer v. West*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, one of the two aspects of the burden of proof.

Consequently, in this case, because the District filed the due process complaint to uphold the appropriateness of its 2011 evaluation and to implement the IEP based upon the evaluation results, including a change in Student's educational placement, the District must establish its entitlement to an order upholding its evaluation and the appropriateness of the proposed IEP.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in " equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Here, the evidence established convincingly that the District's reevaluation is procedurally and substantively appropriate, and that the change of placement recommendation in the IEP proposal, as well as the general contours of the program the District seeks to implement based upon the evaluation results are appropriate, providing no basis for a decision based upon allocating the burden of persuasion to the District. .

2. Evaluation/Reevaluation Standards

The federal IDEA regulations include specific requirements for evaluations and reevaluations for disabled students, set forth at 34 C.F.R. 300.301, *et seq.* The general standards for an appropriate evaluation or reevaluation are found at 34 C.F.R. §§300.304—300.306, which require a school district to: 1) "use a variety of assessment tools;" 2) "gather relevant functional, developmental and academic information about the child, including information from the parent;" 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination;

4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3).

In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Every reevaluation (and initial evaluations if appropriate) must also include: 1) a review of existing evaluation data, including a) local, state and current classroom-based assessments; b) classroom-based observations by teachers and related service providers; 2) a determination of additional data, if any, necessary to determine a) whether the child has an IDEA-defined disability (in the case of an initial evaluation); b) the child’s educational needs, present levels of academic achievement and related developmental needs; c) whether the child needs/continues to need specially-designed instruction and related services. 20 U.S.C. §1414(c); 34 C.F.R. 300.305(a)(1), (2). It is a district’s responsibility to administer all assessments and other measures needed to compile the required evaluation data. 34 C.F.R. 300.305(c).

With respect to reevaluations, a school district must also use the data/information it is required to gather to determine whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(2)(iv).

Once the assessments are completed, a group of qualified school district professionals and the child’s parents determine whether he/she is a “child with a disability” and his/her

educational needs. 34 C.F.R. §300.306(a). In making such determinations, school districts are required to: 1) “Draw upon information from a variety of sources,” including those required to be part of the assessments, assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1). School districts must also provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.*, is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

3. Least Restrictive Environment (LRE) Requirement

The federal IDEA regulations provide that an eligible student’s program is to be delivered in the least restrictive environment (“LRE”) appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2). In addition, unless an eligible child “requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled.” §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993), and subsequently in *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). In accordance with *Oberti*, the first step in evaluating a program and placement to determine

whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Finally, the district must determine whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

If education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3rd Cir. 2006).

Appropriateness of the District’s Reevaluation

Review of the District’s extensive reevaluation report (RR) (S-11) establishes that it amply meets all of the procedural criteria required by the IDEA regulations cited above. The District administered several measures of cognitive ability, including two measures that are

designed minimize the effect of Student's recognized language impairment, in order to fully assess Student's potential for academic learning. (FF 14) The District also administered the C-TONI-II and the KABC-II which are recognized as valid and appropriate for that purpose, according to a well-recognized authority on assessments.² The results of the cognitive assessments were consistent with each other, and with the results of a standardized assessment designed to determine Student's visual motor processing, fine motor planning and visual motor integration. (FF 15, 17, 19; *See also* S-11 p. 38)

The District school psychologist and a behavior specialist observed Student in various school settings to assess Student's social functioning and behavior, and several other District staff provided behavioral observations. (FF 26) The school psychologist also distributed rating scales to assess Student's emotional and adaptive functioning to Parent, to District staff who worked with Student, and as requested by Parent, to adults Student encounters in community settings. (FF 26, 27, 28, 29, 30) None of the people identified by Parent as familiar with Student returned the rating scales, however, including the tutor who has been working with Student for over two and a half years and testified at the hearing. (FF 30, 31)

A speech/language evaluation was conducted by the speech/language pathologist who provides Student's speech/language therapy. (FF 22, 23) An occupational therapy (OT) and a physical therapy (PT) evaluation were provided by professionals in those fields. (FF 24, 25) Curriculum-based assessments in reading and math were conducted by a District reading specialist and a District math specialist. (FF 18, 20, 21) The District's reevaluation, therefore, was certainly comprehensive and designed to assess every area of Student's needs.

² See Sattler, J., *Assessment of Children-Cognitive Foundations, Fifth Edition* (2008, Jerome M. Sattler, Publisher, Inc.) pp. 680—684.

Parent's position with respect to the reevaluation results is essentially that an evaluation such as the District conducted cannot possibly yield substantively appropriate information concerning Student's abilities because Student's disabilities interfere with performance on measures of ability and achievement that must be administered under standardized conditions that do not permit questions to be presented and answers given under the very specific and limited conditions that elicit information and demonstrate skills that Student has. The school psychologist who provided the much more limited private evaluation of Student and obtained far higher results than the District obtained on its assessments, noted in her testimony that the standardized cognitive and achievement assessments selected by the District are designed to test disabilities rather than tease out abilities that may be masked by disabilities. *See, e.g.,* N.T. pp. 1851, 1873.

Although that may well be accurate, Parent's arguments and the testimony of her witness miss the point. The primary purpose of an IDEA psycho-educational evaluation is to assess disabilities, specifically, in the case of an initial evaluation, to determine whether there is a disability, and once that is determined, to investigate whether/how the identified disability affects an eligible student's school performance in all areas, particularly in the regular education setting, as well as how the needs arising from the disability and its adverse effects on school functioning can best be addressed.

As demonstrated by the private evaluation, it is certainly possible to select assessments and/or create very specific conditions under which an evaluator might elicit results suggesting cognitive, language and academic skills at a higher level than Student was able to demonstrate on the District's measures. Results of that kind, however, are of very limited use in the context of determining how best to meet an eligible student's needs in a public school setting. That is

especially true under the circumstances presented by this case, where Parent has been adamant that Student was to be kept in the regular education classroom almost exclusively and was to be instructed entirely in grade level curriculum. The District's reevaluation makes it very clear that the effects of Student's disabilities have very significantly impaired Student's ability to both acquire and demonstrate the language, academic, visual, fine motor and social skills that are needed to access grade level curriculum in the manner and to the extent required to be maintained appropriately in regular education middle school classes with grade level curriculum. Moreover, that situation existed at the time Student entered the District in 3rd grade, according to curriculum based assessments administered in the fall of 2008. *See* S-1 pp. 7—11.

The results of the independent evaluation provided by Parent emphasize rather than undercut the conclusion that the District reevaluation provides substantively accurate information about Student's ability to perform in the regular education classroom. The school psychologist who conducted the evaluation was able to obtain significantly higher results on limited assessments by greatly limiting the tasks that Student was required to perform, provide a high level of encouragement and breaks that nearly equaled the amount of time Student was expected to engage in academic tasks. (FF 34, 35, 36, 37)

Contrary to Parent's argument that the District manipulated the reevaluation to support taking Student out of the regular education classroom, the very abbreviated evaluation that parent provided demonstrated how difficult it is for Student to complete academic tasks without greatly reducing the demands, lengthening the time in which the tasks must be completed and significantly re-shaping the environment in order to achieve performance results that approach an average range of functioning. Again, the question is how accepting such results would provide a reasonable basis for meeting Student's needs in the public school environment, especially, as

Parent wishes, almost entirely in regular middle school classes. Although Parent clearly believes that the District is required to do whatever it takes to assure that Student's achievement in regular education classes is in keeping with the results the independent evaluator was able to obtain from the very limited assessments she conducted, the evaluator herself concluded that Student's high level of anxiety when confronted with relatively few academic tasks, on a one to one basis and in an office where Student's Mother was present, counsels against placement in regular education middle school classes. (FF 39)

Moreover, the description in the evaluator's report and testimony about the anxiety Student exhibited during her limited testing session makes the contention that the District's testing procedures and environment, including the number of sessions, created conditions that reduced Student's performance and depressed the results that could have been achieved under other conditions. Although it is likely that factors arising from Student's genetic condition, such as high anxiety, as well as Student's speech/language disability and possibly an additionally reduced ability to focus and attend arising from ADHD depressed the scores that the District obtained on assessments administered during the evaluation, the District's conclusion that Student is functioning in the moderate range of intellectual disability was established by more than a preponderance of the evidence. The District assessment results, combined with reports of classroom performance from teachers and the formal observations conducted as part of the reevaluation are consistent with the first criterion for the ID category of "significantly sub-average intellectual functioning." 34 C.F.R. §300.8(c)(6).

In order to conclude that Student should be identified in ID category, the IDEA regulations also require "deficits in adaptive behavior." *Id.* The District's reevaluation included several standardized rating scales to assess Student's adaptive skills, behavior and emotional

functioning. (FF 26—29) The results from teachers and Parent were significantly different, suggesting that Student's performance in the home and school environments are significantly different. (FF 27, 28, 29) The results of the Vineland Adaptive Behavior Scales, the BASC-II and the BRIEF completed by teachers were consistent with formal and informal observations of Student in the school setting where many of the behavioral characteristics of Student's genetic condition are observed daily. The results of the teacher ratings indicated that in the school setting, at least, Student's adaptive skills were impaired, supporting the conclusion that Student meets both criteria for the ID disability category.

Parent argues that the middle school staff did not have the opportunity to really get to know Student and for Student to settle into the middle school routine before completing the rating scales in October 2011. Parent also faults the District for not including rating scale results from adults in community settings who have the opportunity to observe and interact with Student in situations that are somewhere between the highly stressful school environment and the comfort of home. The latter argument is entirely spurious, since the District produced cover letters indicating that the rating scales had been sent to everyone Parent identified, yet none returned them. (FF 30, 31) Parent suggested that the District may not have really sent the rating scales, despite the cover letters in the record and the testimony of the Student's tutor she had received the rating scales the second time they were sent by the school psychologist. Parent also argued that because the rating scales were sent in late December 2011, it would have been too late to include the results in the RR had the information been completed and returned. Student's tutor testified that she had not received the documents from the District in late December, and believed that by the time the documents were re-sent, the RR was completed so she felt there was no point in completing the rating scales. (N.T. pp. 1499—1502)

These arguments cannot be credited. Parent herself did not return the rating forms until after the RR was completed, but the District drafted an addendum to the RR to include Parent's ratings. (FF 29) Nothing in the record suggests that the District would not have similarly updated the RR had additional information been received from the individuals Parent suggested. More plausible explanations are that those who were asked to complete the rating scales felt it was too great an imposition on their time, did not feel they had sufficient opportunity to observe or interact with Student or were reluctant to provide information that might be unfavorable to Parent's position. That is particularly likely with respect to the tutor, who obviously likes both Student and Parent, and testified generally and anecdotally to Student's ability to learn under the conditions and with the specific strategies that she provides. (FF 41 N.T. pp. 1515, 1516) The tutor also testified that Student can do certain specific things during the times that she instructs [Student] in the public places (restaurants and bookstores) where she provides her tutoring services, such as remain quiet and listen, follow instructions, order food independently and use public restrooms. (N.T. pp. 1447, 1474—1481) She also testified that she has not frequently observed behaviors such as [redacted]. (N.T. p. 1479) The limited testimony about Student's adaptive behaviors, however, was not nearly as persuasive as it might have been had it been corroborated by scores indicating adequate adaptive functioning on objective, standardized rating scales. The limited scope of the questions addressed to the tutor concerning Student's adaptive skills outside of either the home or school setting, combined with not taking the opportunity to complete the rating scales does nothing to resolve the discrepancy between Parent's assessment of Student's functioning in the home setting and the teachers' ratings of Student in the school setting. If anything, the absence of rating scales from anyone identified by Parent as knowledgeable about Student's ability to function well in community settings suggests that the

results of rating scales completed by those individuals would not have supported Parents' implied argument that Student's adaptive skills in the school setting are actually much higher than indicated by the teachers' ratings. There is no contrary evidence that can reasonably be accorded any weight that casts doubt on the District's conclusion that the level of Student's adaptive skills in the educational environment supports a change of disability category to ID.

Appropriateness of the District's Proposed IEP/Change of Placement

The evaluation results leave no doubt that the District has good reason for proposing to provide Student with direct instruction in reading and math in the smaller setting of a special education classroom. Instructing Student in grade level curriculum materials and almost entirely in the regular education classroom setting, as provided in the October 2009 IEP at Parent's insistence, is not appropriate since Student clearly cannot benefit from grade level instruction in English/language arts and math due to the low level of Student's basic academic skills in those areas. Although this conclusion is no doubt not surprising to Parent, who believed even before the reevaluation was permitted that the District was determined to find a basis for changing Student's placement, Parent may not have anticipated that the District's proposal would be so strongly supported by the two witnesses not associated with the District whose testimony she presented in addition to her own testimony.

On the other hand, however, despite the position that Parent has taken with respect to Student's placement and instructional content in public school, Parent obviously recognized that Student could not derive meaningful educational benefit from academic instruction when presented only with grade level curriculum in the regular education setting, since Parent has had a tutor working with Student on basic reading and math skills for more than two and a half years. (FF 31) Although the tutor does not conduct any formal reading assessments, she estimates that

Student currently “can handle” reading texts at a mid 3rd grade level, but admitted that component skills may be at a lower level. (N.T. pp. 1492, 1493) The tutor’s testimony strongly suggests that Student benefits considerably from focused, direct reading instruction, and, therefore, supports the District’s proposal to provide such instruction regularly and systematically during the school day outside of the regular education setting.

In addition, Parent’s independent evaluator emphasized repeatedly in both her testimony and her evaluation report that based upon her observation of Student in a large, regular education classroom, and during the very limited testing she conducted, Student’s anxiety levels are too high to benefit from instruction entirely in a regular education setting. (FF 39) Although she criticized the lack of teacher involvement with Student during her observation of Student’s 6th grade classes, she did not suggest that a higher level of teacher engagement with Student would have made either the regular education setting and/or a grade level curriculum in language arts and math appropriate for Student. To the contrary, the evaluator opined that Student would benefit most from a school environment in which Student has no contact with non-disabled peers during instruction. (FF 39)

Although the IDEA statute and regulations create a presumption in favor of maximum involvement in the regular education environment and exposure to grade level curriculum, and require serious and significant reasons for reducing an eligible child’s involvement in the regular education setting, the statute, regulations and court decisions interpreting them recognize that the bedrock IDEA principle is the requirement that an eligible child be provided with a “basic floor of opportunity, *i.e.*, an educational placement that is reasonably calculated to provide an opportunity to make “significant progress” in light of an eligible child’s intellectual potential. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Ridley S.D. v. M.R.*, 680

F.3d 260 (3rd Cir. 2012); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3rd at 249; *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

The IDEA regulations, and court decisions, contemplate that school districts cannot always meet that standard with respect to all children with disabilities by means of placement in grade level regular education classes and grade level curriculum. For that reason, within the regulatory section that requires placement in the LRE, the IDEA statute and regulations provide that school districts “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. §300.115(a), based on 20 U.S.C. §1412(a)(5). Such alternatives include special classes as the next step after regular education classes, before consideration of “special schools.” §300.115(b).

In this case, the District has followed both the statutory/regulatory LRE requirements and the standards required by the *Oberti* decision for determining whether education outside of the regular classroom for part of the school day is warranted. It had demonstrated that Student needs basic skills instruction in reading and math that cannot be satisfactorily provided in regular education middle school classes. The District must be given the opportunity to implement its proposal for direct, explicit instruction in reading and math skills at an instructional level from which Student can benefit before there could be any consideration whatsoever of a private school placement. This is especially true in this case, since direct instruction has not been provided to date due only to Parent’s refusal to agree to the type and level of instruction in basic reading and math skills that the record establishes is necessary for Student to have the opportunity to make meaningful progress. (S-1 pp. 20, 21)

The District, therefore, will immediately be permitted to implement the IEP it proposed in January 2012, that has not been implemented due to Parent's refusal to consent to the proposed placement.

Current/Future Program/Placement Considerations

Parent's disagreement with the January 2012 IEP proposal, in addition to her adamant opposition to instruction in a special education classroom, despite the testimony of witnesses she presented centers on the goals in reading, math, speech/language and behavior, which Parent contends are at too low a level, since Student has mastered many of those skills. *See generally* Parent' closing Argument at pp. 42—44. The record very clearly establishes Student, however, has not demonstrated in the school setting the skills that Parents and her other witnesses assert that Student has acquired and might be able to apply at home and in other settings. In addition, it may be that some or even all of the goals need to be revised and updated since the IEP proposal was drafted more than a year ago and based on Student's levels at that time. That circumstance, however, does not warrant entirely rejecting the proposed IEP and leaving in place the October 2009 IEP, requiring grade level instruction and placement in regular education classes almost entirely. Although Parent identified a number of purported flaws in the proposed IEP goals, the criticisms of the proposed IEP goals by the school psychologist who privately identified Student centered primarily on the absence of baselines in many of the goals, which of, course, would be outdated and likely unusable by now even if they had been included in the IEP as originally drafted. *See* N.T. pp. 1926—1937.

Obviously, however, the IEP must be updated as soon as possible. The IDEA regulations provide that school districts must assure that an eligible child's IEP team reviews his/her IEP at least annually. 34 C.F.R. §300.324(b). Although the proposed IEP has not been implemented,

making it impossible to determine Student's progress toward the goals, Student has still been receiving instruction both within the District and through private tutoring during the past year. Consequently, although the proposed IEP may be implemented on an interim basis, Student's present levels of performance must be determined and Student's IEP team must be convened as soon as possible to review the goals and establish baselines for the goals to be included in the IEP after such review.

In addition, although Parent's expert witness's disagreement with the substance of some of the IEP goals and suggestion for a goal or goals to address Student's participation in the regular education classroom are not a sufficient basis for concluding that the proposed IEP is substantively inappropriate, those matters merit consideration and discussion by the IEP team. That comment is not intended to suggest, however, that the IEP team must eliminate/include any goals questioned by Parent's witness, or that the failure to do so would make the resulting IEP either procedurally or substantively inappropriate.

On the other hand, however, the witness's observations and comments concerning Student's improved motivation and performance when permitted to respond to assessments with an I-pad strongly suggest that Student could likely benefit from assistive technology. The District noted at some point during the due process hearing that it did not believe that an assistive technology evaluation was within the parameters for a reevaluation established by the prior hearing officer order, suggesting that it would otherwise have suggested it. Such an evaluation is, however, warranted at this point and will be ordered. Although an independent assistive technology evaluation will not be ordered, and the District will not be explicitly required to go beyond the SETT process, the District should give careful consideration to whether completing a

SETT assessment alone will be sufficient to identify and effectively address Student's assistive technology needs.

Finally, the cooperative IEP process between parents and school districts must be emphasized as these parties resume working together to assure that Student is provided with special education services reasonably calculated to provide an opportunity for Student to make meaningful progress. Although Parent obviously wants to assure that her child's potential is maximized, IDEA does not require that, or that Student be provided with every possible support and service that would permit all necessary special education services to be delivered entirely in a regular education setting. Going forward, Parent must keep in mind that although she is entitled to participate fully in the development of Student's special education program, she does not have the right to control the process. *See K.C. v. Nazareth Area School District*, 806 F. Supp. 2d 806, 829 (E.D. Pa. 2011). Hopefully, the parties will be able to put aside their differences and work together for Student's benefit in the future.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that

1. The School District is not required to provide an independent educational evaluation to Student, since the District conducted an appropriate reevaluation, as described in the reevaluation report dated 12/9/11 and the addendum dated 1/6/12.
2. The School District may implement the proposed IEP dated January 12, 2012, including the change of placement from itinerant to supplemental learning support services and the provision of replacement instruction for reading/language arts and math in a special education classroom, until such time as the parties agree to a new, updated IEP.

It is **FURTHER ORDERED** that the School District shall convene an IEP team meeting as soon as possible, but no later than 30 days after the date of this order, to review the IEP goals and specially designed instruction in light of Student's present

levels of educational and functional performance and to establish appropriate baselines for goals included in the new IEP proposal.

It is **FURTHER ORDERED** that the School District shall complete an assistive technology evaluation of Student before the end of the 2012/2013 school year.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

February 18, 2013